

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1199

To be argued by
MARTIN E. GOTKIN

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ISMAEL SUAREZ TORREZ,

Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

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Questions Presented

- I. DID THE COURT BELOW ERR IN PERMITTING THE GOVERNMENT TO INTRODUCE EVIDENCE CONCERNING THE APPELLANT'S ALLEGED INVOLVMENT IN A FRAUDULENT MONEY ORDER SCHEME WHICH HAD NOTHING TO DO WITH THE CRIMES THAT APPELLANT WAS CHARGED WITH IN THE INDICTMENT?
- II. WAS THERE SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN THE APPELLANT'S CONVICTION?

STATEMENT PURSUANT TO RULE 28 (3)

Preliminary Statement

Appellant, Ismael Suarez Torrez, appeals from a judgment of the United States District Court, Southern District of New York (Wyatt, J.,) convicting him of conspiracy to violate the Federal Food Stamp Act (18USC 371); the unlawful transfer of food stamps and cards, theft of government property (18 USC 641) and making false claims against the United States Government (18 USC 287).

Appellant was **sentenced to a period of imprisonment** of three months on each of the four counts to run concurrently.

Facts

The appellant Torrez was named along with Hector Perez in a ten count indictment (77 Cr. 1045) charging conspiracy to violate the Federal Food Stamp Act, unlawful transfer of food stamps and cards, theft of government property and making false claims against the Government.

The appellant, Torrez, was an employee of a check cashing establishment owned by a co-defendant, Modesto Diaz (who pleaded guilty before trial). At various times during the period of time charged in the indictment, other co-defendants (who also pleaded guilty and testified for the Government) to wit: Joseph Rivera and Jose Rosado, would

present to Torres , as such employee, Authorization to Purchase Cards ("ATP" Cards). These ATP cards are mailed twice a month to an eligible household. In the City of New York, the head of an eligible household may go to a bank or a licensed check cashing establishment (such as the one which was owned by Modesto Liaz and in which appellant, Torres worked in) in order to convert the ATP Cards into food stamp coupons. The person presents the card and the amount of cash required by the card in order to purchase a certain amount of food stamp coupons. The licensed check cashier receives a fee of approximately \$.50 for each card that is redeemed.

The defendant, Jose Rosado, was the owner of Rosado Fresh Eggs a retail outlet in the Bronx. Under the food stamp program an authorized retail food store (such as Rosado's) is allowed to accept food stamp coupons in exchange for eligible food. The store is permitted to deposit these food stamp coupons in a bank account.

The Testimony of Jose Rosado

Rosado testified that from 1975 to September, 1976 he was in the business of delivering eggs to grocery stores and was authorized to accept food stamp coupons. Subsequently in the fall of 1975, he agreed with a co-defendant, Andres Collazo, to cash ATP Cards. Rosado then agreed with defend-

ant, Modesto Diaz, the owner of a check cashing establishment at Burke Avenue, in the Bronx, where appellant Torrez was employed to cash the ATP Cards there.

Thus the ATP Cards that were given to Rosado by Collazo were in turn given to Diaz's check cashing establishment.

Rosado stated that he first met Torrez in the Spring of 1975 and after a conversation with Diaz, he brought ATP Cards to Torrez in exchange for the difference in cash and the remainder in coupons. In addition, Rosado testified that he gave to Torrez a "tip" of about \$10.00 or \$20.00 (133a)* and at subsequent times he gave Torrez a tip of \$30.00 or \$40.00 on each trip which occurred approximately twice a month.

Further, testimony revealed that Rosado received his stolen ATP Cards not only from Collazo and the defendant Rivera, but also from drug addicts.

After Rosado was arrested on September 13th, 1976 he agreed to cooperate with the Government and had certain conversations recorded with appellant Torrez by means of of both a body tape worn by Rosado and by a telephone tape on his telephone.

At one of these telephone conversations with Torrez

* References are made to the Appellant's Appendix

recorded on September 27, 1976, there was not only discussions about food stamps but also concerning blank money orders which Rosado claims were sold to him by Torrez for \$10.00 and for which he in turn sold for \$40.00 or \$50.00. Additional conversation concerning the money orders followed (134a-136a) which will be discussed more fully below.

The transcript of this and other conversations as well as the tapes themselves were received in evidence over counsel's objections to that portion which referred to the money orders.

On cross-examination by counsel for Torrez, the defendant Rosado admitted that he had children as young as eleven years old sign and forge the names on the ATP Cards that found their way to Diaz's check cashing establishment and that these children were paid by Rosado \$1.00 or \$.50 per card.

The Testimony of Joseph Rivera

Rivera testified that he cashed ATP Cards with Torrez and although he stated that he informed Torrez the cards were stolen no one ever was present during any of the transactions with Rivera. Rivera claims he gave Torrez \$3.00 per card.

On cross-examination Rivera admitted supporting

himself by gambling and getting stolen ATP cards from drug addicts and that he had lied to the Assistant United States Attorney on his first interview.

Testimony of William J. Burke

This witness, an investigator with the U.S. Department of Agriculture was called to corroborate the testimony of Rosado.

On cross-examination, he admitted that he never saw any transaction between Torrez and Rosado.

POINT I

THE APPELLANT TORREZ WAS DEPRIVED OF A FAIR TRIAL BY REASON OF THE FACT THAT THE COURT BELOW PERMITTED THE GOVERNMENT TO INTRODUCE EVIDENCE CONCERNING THE APPELLANT'S ALLEGED INVOLVMENT IN A FRAUDULENT STOLEN MONEY ORDER SCHEME WHICH EVIDENCE HAD NOTHING TO DO WITH THE CRIMES THAT APPELLANT WAS CHARGED WITH IN THE INDICTMENT.

Prior to the trial, the Government made available to counsel copies of transcripts of body and telephone tapes between appellant Torrez and the defendant Rosado. Besides the discussions of food stamps, there were conversations relating to counterfeit money and also references to blank money orders which apparently were stolen and were sold by appellant Torrez and then resold at a higher price to persons who ultimately cashed them.

At a pre-trial conference and hearing concerning the tapes held on January 27, 1977, before the Honorable Trial Judge Inzer B. Wyatt, counsel for appellant Torrez brought these facts to the Courts attention and moved that references in the transcripts and tapes to counterfeit money and the money order scheme be deleted. His Honor ruled that the references to counterfeit money was to be deleted but further ruled that the reference to the money orders was admissible as "evidence of similar acts" or incidents and to show that the actions of the appellant Torrez for which he was charged in the indictment were not inadvertent. Further, the Court stated that he would instruct the jury that the money orders had nothing to do with the case (102a-124a).

A reading of the transcript of the tape recorded on September 27, 1976 by a Nagra body tape between Jose Rosado ("Rosado") and appellant Torrez ("Eddie") show, it is submitted, the devastating effect that these conversations had to have upon the jury.

A copy of the **redacted** transcript which was introduced as Government exhibit 8 (b) and which left out the reference to counterfeit money but retained all references to the stolen money orders is set forth in the Appendix (125a-129a).

A reading of this transcript shows that indeed the majority of the conversation between "Rosado" and "Eddie" concerned itself not with food stamps which was the subject matter of the indictment but rather with the so called money

order scheme. There has been **bracketed** by this writer in the right hand margin of the transcript all those portions that relate to the money orders. The conversation is certainly devious and sinister and could not help but have a "spill-over" effect on the jury to the great prejudice of the appellant.

Thus, at page two, Rosado states to Eddie

"You say that you don't know nothing, that you - - - that they were sold, brother, that you know that they were sold, nothing else. You give them the story, that's it. Nothing else. You tell them the story. They were sold. They were sold here. Your explain to them the whole story and nothing else, and you stick to your story." (126a).

Thus, in the jury's mind this could have easily been interpreted as an attempt by appellant to concoct a cover-up story in regard to the food stamps. Certainly, this had an effect on defendant's decision not to take the stand in his own defense since the appellant would have been faced with answering questions and explaining the money order transactions which, it is submitted, had nothing to do with this case.

Similarly the telephone tape between Rosado and appellant Torrez of **September** 27, 1976, (Exhibit 7(b)) which is set forth in the Appendix (130a-132a) likewise has references to the money order transactions as well as the food stamps.

Again, on the right hand margin there has been placed in brackets by this writer those items which relate to money orders.

Thus at one point "Eddie" says: "You're in jail and you don't know it" and later, "I'm being investigated there". At the trial defense counsel objected, which objection was overruled (134a - 136a). In addition, in the Government's summation, the Assistant United States Attorney repeatedly referred to the money orders which was objected to by defense counsel (137a-142a).

It is appellant's contention that the evidence of his other "wrongs" or "acts" relating to the money orders, which the Court admitted to rebut the defense of inadvertance or to show absence of mistake or accident was error in that the undue prejudice far out weighed the probative value of the evidence.

Rule 404 (a) & (b) of the Federal Rules of Evidence provides in part as follows:

"(a) Character evidence generally.
Evidence of a persons character as a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion except:...

(b) Other crimes, wrongs or acts.
Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident".

Rule 403 of the Federal Rules of Evidence provides in part as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..."

It is further appellant's contention that even assuming arguendo that the evidence concerning the money orders was relevant, it should have been excluded pursuant to Rule 403. Even though his Honor at the pre-trial hearing stated that he would give a limiting instruction to the Jury to the effect that the money orders had nothing to do with the issues in the instant case (116a) it is submitted that such instruction was ineffective.

As stated by Professor Paul F. Rothstein of Georgetown University Law Center in his analysis of the New Federal Rules of Evidence Annotated (The Bureau of National Affairs, Inc., Washington, D.C. 1975) at page 51:

"With respect to excluding on grounds of unfair prejudice, the Advisory Committee says that consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. The availability of other means of proof may also be an appropriate factor".

As to the application of the exception to Rule 404

(b) Professor Rothstein states as follows:

"As to subdivision (b) the Advisory Committee emphasizes that the rule provides no mechanical solutions. The determination that must be made is whether the danger of undue prejudice outweighs the probative value of the

evidence in view of the availability of other means of proof or other factors appropriate for making decisions of this kind under Rule 403 (a)..."

This writer is aware of the numerous cases in this jurisdiction affirming the right of the Government to introduce into evidence prior similar acts as probative of the issue of intent or knowledge, should intent or knowledge be a legitimate issue in the trial. United States v. Ross, 321 F2d 61 (2nd Cir., 1963).

It is appellant's main contention that the alleged similar act involving stolen or fraudulent money orders as alleged by the Government is in fact not a "similar act" in that this transaction clearly is substantially different and does not "closely parallel" the facts involved in the instant case as alleged by the Government in the indictment. The question must be asked in this case as to what blank money orders had to do with the Federal Food Stamp Program and the rather sophisticated and complicated conspiracy alleged in the indictment and the specific acts that the appellant Torrez was charged with.

The transactions are not "closely related in subject matter and manner" and therefore should be excluded. United States v. Chestnut, 533 F2d 49 (2nd Cir., 1976).

POINT II

THE EVIDENCE AGAINST APPELLANT
TORREZ WAS INSUFFICIENT TO SUS-
TAIN HIS CONVICTION.

Jose Rosado, the main Government witness against the Appellant stated that he gave to the appellant Torrez, "tips" in the **minimal** amount of from \$10.00 to \$40.00 when he came to the Burke Avenue check cashing establishment to cash in the ATP cards. Certainly in the light of the fact that the Government was "ripped off" in this scheme to the tune of some \$2.5 million dollars, the giving of this money could certainly be considered as nothing more than a **bona fide "tip"**.

In addition, appellant was a mere employee of defendant, Modesto Diaz, who was the owner of the check cashing establishment and the one that had made the arrangement with Rosado.

The testimony of Joseph Rivera who admitted he lied at first to the Assistant United States Attorney and who makes his living gambling, and who testified that he told appellant that the ATP cards he gave him were stolen was completely uncorroborated.

Indeed both Rosado and Rivera were both known in the food stamp business and it would not be **unusual** for them to be dealing in ATP cards and food stamps.

In addition, Special Agent William J. Burke testified that he never witnessed any transactions between Torrez and Rosado, nor was there any witness to the transactions between Rivera and appellant Torrez.

It is certainly not far-fetched nor unlikely that had not there been the conversations concerning the stolen money orders, which so prejudiced the appellant's trial that the jury would not have convicted the appellant Torrez on the evidence just related to the food stamps.

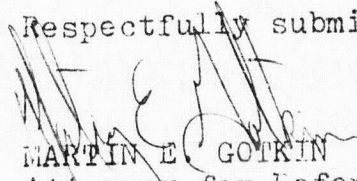
POINT III

APPELLANT TORREZ ADOPTS ALL RELEVANT POINTS RAISED BY THE
CO-APPELLANT.

CONCLUSION

Because of all of the reasons set forth above, it is respectfully submitted that the conviction of appellant Torrez should be reversed.

Respectfully submitted,


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**COURT OF APPEALS
SECOND CIRCUIT**

**UNITED STATES OF AMERICA,
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**ISHMAEL SUAREZ-TORREZ, a/k/a "Eddie",
Defendant-Appellant.**

**From a Judgment of Conviction of the U.S. Dist.
Court for the Southern District of N.Y.**

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the 23 day of June, 19 77 at One St. Andrews Plaza
New York, New York

deponent served the annexed *Brin*

upon
U.S. Attorney-Southern District
Robert Jiske, Jr.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 23
day of June, 19 77

Reuben A. Shearer

Reuben A. Shearer

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979